UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	)	
	)	
Seafood Shoppe, Inc.,	)	Docket Number: SE 1100753
	)	
Respondent.	)	
	)	

INITIAL DECISION AND ORDER

Date: September 16, 2015

Before: Christine Donelian Coughlin, Administrative Law Judge, U.S. EPA[1]

Appearances:

For the Agency:
Meggan Engelke-Ros, Esq.
Office of the General Counsel, Enforcement Section
National Oceanic and Atmospheric Administration,
U.S. Department of Commerce,
Silver Spring, MD

For Respondent:
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[1] The Administrative Law Judges of the United States Environmental Protection Agency ("U.S. EPA") are authorized to hear cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011. See 5 U.S.C. § 3344; 5 C.F.R. § 930.208.

I. PROCEDURAL BACKGROUND

The National Oceanic and Atmospheric Administration ("NOAA" or "Agency") issued a Notice of Violation and Assessment of Administrative Penalty ("NOVA"), dated April 18, 2014, to Mr. John Weeks on behalf of Seafood Shoppe, Inc. (collectively, "Respondent"). In the NOVA, the Agency alleged one count in which Respondent violated the Magnuson-Stevens Fishery Conservation Management Act ("Magnuson Act" or "Act"), 16 U.S.C. § 1857(1)(a), and Agency regulation 50 C.F.R. § 635.20(f), and sought to impose a total penalty of $2,000 against Respondent for this violation.[2] Respondent, through counsel, timely requested a hearing before an Administrative Law Judge.

On July 10, 2014, I was designated as the Administrative Law Judge to preside over this matter. On July 21, 2014, I issued an Order to Submit Preliminary Positions on Issues and Procedures (PPIP) ("PPIP Scheduling Order"). In the PPIP Scheduling Order, I set forth various prehearing filing deadlines and procedures, and ordered the Agency to file its PPIP on or before August 22, 2014, and Respondent to file his PPIP on or before September 5, 2014. On August 8, 2014, the Agency filed its PPIP. On September 5, 2014, Respondent filed his PPIP. On October 9, 2014, I issued a Hearing Order setting filing deadlines and scheduling the hearing to commence on January 22, 2015, continuing as necessary through January 23, 2015, in Jacksonville, Florida.

I conducted a hearing in this matter in Jacksonville, Florida, that began and concluded on January 22, 2015. The Agency presented Agency's Exhibits ("AE") 1, 2, 5 through 7, 11 through 13, 16, and 18, which were admitted into evidence. The Agency also presented the testimony of four witnesses: Richard Chesler, a Special Agent with NOAA's Office of Law Enforcement; Mark Fields, a Special Agent with NOAA's Office of Law Enforcement; Randy Blankinship, Southeast Branch Chief for NOAA Fisheries Highly Migratory Species (HMS) Management Division; and Sascha Cushner, a NOAA Fisheries Biologist for the Pelagic Observer Program. Respondent presented Respondent's Exhibit ("RE") 8, which was admitted into evidence. Respondent also presented the testimony of three witnesses: Christopher Davis, former captain of the fishing vessel, Yellowfin; Jeff Trew, a contractor who performs scientific observation for the NOAA Fisheries Observer Program; and John Weeks, owner of Seafood Shoppe, Inc.

The Hearing Clerk of this Tribunal received the official transcript of the hearing in this case on February 6, 2015, and electronic copies of the transcript were sent to the parties on February 10, 2015.[3] Also on February 10, 2015, I issued an Order Closing Evidentiary Record and Scheduling Post-Hearing Briefs, which set the following deadlines: February 20, 2015, as the deadline for any motions to conform the transcript to the actual testimony; March 13, 2015, as the deadline for the Agency's Initial Post-Hearing Brief; April 3, 2015, as the deadline for Respondent's Initial Post-Hearing Brief; April 17, 2015, as the deadline for the Agency's Reply

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[2] On January 9, 2015, the Agency filed an amended NOVA to correct a regulatory citation and a statutory reference.

[3] Citations herein to the transcript are made in the following format: "Tr. [page]."

Post-Hearing Brief; and May 1, 2015, as the deadline for Respondent's Reply Post-Hearing Brief.

No motions to conform the transcript to the actual testimony were filed in this case. On March 13, 2015, the Agency filed its initial Post-Hearing Brief ("Agency's Ini. Br."). On April 3, 2015, Respondent filed his initial Post-Hearing Brief ("Resp. Br."). On April 17, 2015, the Agency filed its Reply Brief ("Agency's Rep. Br.").[4] No Reply Brief by Respondent was received.

II. STATEMENT OF THE ISSUES

At issue is whether the Agency established, by a preponderance of the evidence, that on or about February 28, 2011, Respondent violated the Magnuson Act by possessing a north or south Atlantic swordfish taken from its management unit that: (1) no longer had its head naturally attached, and (2) was less than 29 inches, as measured from cleithrum to caudal keel ("CK").

If liability for the charged violation is established, then I must determine the appropriate amount, if any, to impose as a civil penalty for the violative behavior. To this end, I am to consider certain factors, including: the nature, circumstances, extent, and gravity of the violation(s), Respondent's degree of culpability, any history of prior violations, ability to pay, and such other matters as justice may require.[5]

III. FACTUAL BACKGROUND

The following is a recitation of the facts I have found in this matter based on a careful and thorough review of the evidentiary record.

Respondent is a wholesale and retail seafood outlet in St. Augustine, Florida, and, from April 1, 2010, through March 31, 2011, held a Federal Fisheries Permit as a Domestic Swordfish Dealer. Tr. 182, AE 18 at 1 through 5. Respondent's unloading facility is on the water, near a long commercial dock. Tr. 214. Respondent has an arrangement with approximately 20 fishing vessels that use this commercial dock whereby Respondent provides the vessels with ice and bait for their fishing activities and, upon their return to the dock, Respondent unloads and purchases the various catch from the vessels. Tr. 214–18. One of these fishing vessels with which Respondent had an arrangement in 2011 was named the Yellowfin. Tr. 188–90. Specifically, in February 2011, Respondent had loaded the Yellowfin with ice and bait and understood from the captain, Christopher Davis ("Davis"), that the Yellowfin would be at sea for approximately two weeks fishing for Atlantic swordfish, swordfish that Respondent expected to purchase upon the vessel's return to the dock. Tr. 165–67, 188–89.

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[4] The Agency filed two briefs on this date, the second filing merely corrected the title of its first submission to read "Agency's Reply Brief" instead of "Agency's Post-Hearing Brief."

[5] While "ability to pay" is a factor that may be considered when determining penalty, Respondent did not raise such claims in this case. *See* 15 C.F.R. § 904.108.

Atlantic swordfish are a highly migratory species ("HMS") that "migrate over long distances and across different boundaries and jurisdictions," as explained by NOAA's Southeast Branch Chief and Fishery Management Specialist for the Atlantic HMS Division, Randy Blankinship ("Blankinship"). Tr. 15–16. Atlantic swordfish are managed internationally by the International Commission for the Conservation of Atlantic Tunas, the recommendations of which member nations are bound to implement. Tr. 16–17. In the United States, those recommendations are implemented domestically through various management measures, including, for example, minimum size limits of Atlantic swordfish. Tr. 17. The purpose of such minimum size limits is "to protect juvenile swordfish and allow them to grow to a larger size so a good portion of them reach maturity and can reproduce and contribute to the stock." Tr. 17–18.

Since 1999, up to and including the time of the alleged violation in February 2011, there were two length measurements to determine minimum swordfish size: the Lower Jaw Fork Length ("LJFL") of 47 inches, "a straight line measurement from the tip of the lower jaw to the fork of the tail;" and a CK measurement of 29 inches, "a curved measurement from the cleithrum, which is the bony portion of the fish right underneath the gill plate . . . to the anterior portion of the insertion of the caudal keel . . . ." Tr. 18, 21. According to Blankinship, the LJFL measurement is "intended to apply for a whole fish that is intact," whereas the CK measurement applies to a "dressed" fish, meaning an eviscerated fish that has had its head and fins removed, which arose in response to requests by fishermen to be able to dress a fish at sea to maximize storage space on the vessel. Tr. 18–19. Such requirements are communicated by the Agency to the public through publication of its regulations, release of a "commercial compliance guide," and mailings of letters to permit holders as well as electronic mailings to subscribers of such form of notification. Tr. 19. The "commercial compliance guide" in effect in 2011 included drawings depicting how to measure a swordfish based on each method of measurement, the LJFL and the CK. Tr. 20–21.

As mentioned, in February 2011, the fishing vessel Yellowfin, captained by Davis, set out for a multi-day fishing trip to catch Atlantic swordfish as well as tuna. Tr. 166–69. Accompanying Davis were several other crew members of the vessel, and a National Marine Fisheries Service (NMFS) Observer, Jeff Trew ("Trew"). Tr. 132–33, 168. As an Agency Observer, Trew was responsible for gathering various data from the fishing trip, including, for example, gear information and species information like weights and measurements. Tr. 117–20. The data that was collected was used by the Agency for fishery management purposes, not enforcement purposes. Tr. 123–24.

During the course of the fishing trip, several swordfish were caught and retained. AE 13 at 3, AE 16 at 27, 29, 31, 33, 35, 37, 39, 41, 45. It was the practice of Davis and his crew, particularly the crew member who butchered the catch throughout the trip, to first measure a fish to determine if it was of legal size before making any cuts to, or butchering, the fish. Tr. 172–74. Of the many swordfish caught and retained during this trip, all but two were of legal size using the CK measurement. Tr. 177–78. Those swordfish that were of legal size using the CK measurement were then "dressed" by being gutted (eviscerated) and by having their heads and fins (tails) removed. Tr. 176–77. The two swordfish that were not of legal size using the CK measurement were, according to Davis, believed to be of legal size using the LJFL measurement. Tr. 177–78. These two swordfish were then butchered in a different manner from the rest in that

the entire head of the fish was not removed. Rather, only a portion of the head was removed. Specifically, the upper portion of the head was removed, from the eyeball cavity up to and including the bill of the swordfish, while the lower jaw of the fish remained. Tr. 170–71, 176–78, AE 12, RE 8. According to Davis, the lower jaw of the fish was retained to allow for a "solid measurement" to be taken of the lower jaw of the fish for compliance purposes using the LJFL measurement. Tr. 171.

NOAA's Observer, Trew, recorded measurements of the swordfish caught during this trip as part of his data collection responsibilities. AE 16. Additionally, Trew attached a tag number to each fish carcass. Tr. 117–18, 139–40. While the specific tag number of the swordfish in this dispute is not entirely clear, it appears from the evidence that carcass tag numbers 362 and 366 correspond to two swordfish that were retained from the trip using a LJFL measurement and that the lower jaws of these two swordfish remained attached to the carcass. Tr. 62–63, 66–68, 84–85, 91–92, 94, 108–09, 122–23, 126, 152–53, 176–78, 201, 208–09, AE 12, AE 16 at 37, 41, RE 8.

Notably, for purposes of the Observer Program, the LJFL measurement that is taken by an Observer is a "curved" measurement, not a "straight-line" measurement.[6] Tr. 119–22, 125, 154-55. According to Trew, he not only took and recorded a "curved" measurement for purposes of the Observer Program, but he also held the tape measure to take, but not record, imperfect straight-line measurements of a fish to assist the butcher in making an initial decision as to the legality of the size limit of a fish. Tr. 157-63. According to the data Trew collected, carcass tag numbers 362 and 366 measured 120 centimeters (cm), using a curved LJFL measurement. Tr. 120–23, 136–40, 154, AE 16 at 37, 41. According to Trew, who has measured "thousands" of swordfish as an Observer, a curved measurement "is always going to be a little bit longer" than a straight-line measurement. "It might just be a teeny-weeny bit longer [or] it might be a whole bunch longer, depending on the length and the size of the fish." Tr. 154–55.

Upon the Yellowfin's return to the dock on February 25, 2011, Respondent purchased various swordfish from Davis, including the two swordfish that had their lower jaws retained. Tr. 188–192, AE 13 at 3. At this time, each swordfish was weighed. Tr. 191–93, AE 13 at 3. The larger swordfish were weighed first, and the two swordfish with their lower jaws still attached were set aside to be weighed last. Tr. 191–92. Typically, an Observer will remain in the area while the tagged swordfish are weighed so that "weights that are achieved at the dock after the fact" can be associated with the length measurement taken by the Observer of each tagged swordfish documented in the Observer's data collection paperwork. Tr. 118, 192–93, 208. On this occasion, Trew remained throughout the weighing process of the swordfish. Tr. 190–92, 208.

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[6] For enforcement purposes, a LJFL measurement used to determine the minimum size of an Atlantic swordfish is a straight-line measurement, "not made along the curve of the body," whereas a CK measurement is a "curved measurement" made along the "body contour" of the fish. *See* 50 C.F.R. § 635.2.

When the time came for the last two swordfish to be weighed, namely, the two swordfish that had been set aside with their lower jaws still attached, Respondent was prepared to get his tape measure to first measure the length of each swordfish and confirm whether each was of legal minimum size. Tr. 192, 216. According to Respondent, he was "either walking toward the fish with a tape [measure] or going to get a tape [measure]," when Trew said "those fish were fine." Tr. 192, 209, 216. Respondent had no prior experience with NOAA Observers as this was his very first encounter with the Observer Program. Tr. 209. Respondent did not previously know or have familiarity with Trew. Tr. 189. Respondent also did not know what method of measurement Trew utilized to support Trew's claim that the fish were "fine." Tr. 216. Nevertheless, Respondent did not feel the need to independently measure these last two swordfish prior to obtaining their weight and storing them in the cooler, where the rest of Respondent's purchased fish were packed. Tr. 192, 195, 209, 215.

On February 28, 2011, two Special Agents with NOAA's Office of Law Enforcement, Richard Chesler ("Chesler") and Mark Fields ("Fields"), along with Florida Fish and Wildlife Conservation Commission officers, conducted a dealer inspection of Respondent's facility. Tr. 58, 60-1, 104–05, AE 1 at 1 of 4, AE 2 at 1. Initially, Respondent's federal fisheries permits were inspected, after which fish in the facility were examined. Tr. 62, AE 1 at 2 of 4. Chesler and Fields examined fish stored in Respondent's cooler (or freezer) and saw a pallet of swordfish Chesler immediately recognized to be Atlantic swordfish. Tr. 62, 105, 196, AE 1 at 2 of 4. Chesler and Fields observed one swordfish in particular that appeared shorter than the others with its lower jaw still attached and they proceeded to measure its size. Tr. 62, 105–06, AE 1 at 2 of 4. Chesler and Fields measured this swordfish for enforcement purposes, using both the CK and LJFL measurement. Tr. 63–64, 106–08, AE 1 at 2 of 4, AE 12. Both Chesler and Fields have prior experience measuring the size of Atlantic swordfish for enforcement purposes. Tr. 89–91, 110. In measuring the swordfish, Chesler and Fields first took a CK measurement, namely a curved measurement along the body of the fish, wherein they "used a tape measure, laid it on the bony portion of the cleithrum, [and] ran the tape measure to the anterior portion of the caudal keel . . . ." Tr. 63–65, 106–07, AE 12 at 1–3. They next took a LJFL measurement, namely a straight-line measurement, described as one in which "the ruler is up against the very end point of the lower jaw of this swordfish. And the ruler is straight. It's on the ground, so to speak, not laying on top of the fish. There's no curve for this measurement. The ruler is next to the fish. And the measurement would end at the fork of the tail." Tr. 107–08, AE 12 at 7. Based upon their measurements, the swordfish measured 27 inches using the CK measurement, and 46 inches using the LJFL measurement. Tr. 63–64, AE 1 at 2 of 4, AE 12. Chesler and Fields then notified Respondent that the swordfish was undersized. Tr. 66, AE 1 at 3 of 4. Following this notification, Respondent accompanied Chesler and Fields back into the cooler, and the swordfish was remeasured using the CK measurement, revealing a length of 27 inches. Tr. 66–67, 108, AE 12 at 1–3, and 5. Respondent did not challenge this CK measurement and signed a measurement form agreeing to the 27 inch measurement of the swordfish. Tr. 66–67, 198–99, AE 1 at 3 of 4, AE 5.

Respondent explained to Chesler and Fields his belief that the swordfish, which was undersized using the CK measurement, would be of legal size if measured using the LJFL measurement. Tr. 196. Chesler explained that the CK measurement was the sole form of measurement when the head of the swordfish has been removed. AE 1 at 3 of 4. Respondent did

not agree that the head of the swordfish had been removed since the lower jaw of the fish remained. Tr. 196–99. Chesler issued Respondent an enforcement action report for possessing an undersized swordfish measuring "less than 29 inches CK." Tr. 73–74, AE 1 at 3 of 4, AE 6. Thereafter, Respondent independently measured the swordfish, which he contends possessed tag number 362, using a curved LJFL measurement, and believed the swordfish was of legal minimum size. Tr. 200–04, 211, RE 8.

IV. PRINCIPLES OF LAW

Liability

Congress enacted the Magnuson Act in 1976 "to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States." Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 401, 90 Stat. 331 (codified at 16 U.S.C. § 1801). The Act, as amended, aims to "promote domestic commercial and recreational fishing under sound conservation and management principles." *Id.*

Section 307(1)(A) of the Magnuson Act makes it unlawful "for any person—to violate any provision of this Act or any regulation or permit issued pursuant to this Act." 16 U.S.C. § 1857(1)(A). "Person" is defined to include "any individual . . . , any corporation, partnership, association, or other entity . . . , and any Federal, State, local, or foreign government or any entity of any such government." 16 U.S.C. § 1802(36).

Pursuant to the Act, the Agency implemented regulations pertaining to Atlantic Highly Migratory Species, which include Atlantic swordfish and which "govern conservation and management of North and South Atlantic swordfish in the management unit." 50 C.F.R. §§ 635.1(a), 635.2. To that end, Agency regulations impose size limitations to such swordfish as follows:

> For a swordfish that has its head naturally attached,[7] the [lower jaw-fork length] LJFL is the sole criterion for determining the size of a swordfish. No person shall take, retain, possess, or land a whole (head on) North or South Atlantic swordfish taken from its management unit that is not equal to or greater than 47 inches (119 cm) LJFL. A swordfish with the head naturally attached that is damaged by shark bites may be retained only if the length of the remainder of the fish is equal to or greater than 47 inches (119 cm) LJFL.

[7] The regulations in effect at the time of the alleged violation did not define "naturally attached" as it pertained to swordfish. Subsequent to the alleged violation, Agency regulations defined the term "naturally attached" as it pertains to swordfish as follows: "As used to describe the head of a swordfish, naturally attached refers to the whole head remaining fully attached to the Carcass except for the bill, which may be removed provided it has been removed forward of the anterior tip of the lower jaw." 50 C.F.R. § 635.2 (2012).

> If the head of a swordfish has been removed prior to or at the time of landing, the CK measurement is the sole criterion for determining the size of a swordfish. No person shall take, retain, possess, or land a dressed North or South Atlantic swordfish taken from its management unit that is not equal to or greater than 29 inches (73 cm) CK length. A swordfish with the head removed that is damaged by shark bites may be retained only if the length of the remainder of the carcass is equal to or greater than 29 inches (73 cm) CK length.

50 C.F.R. § 635.20(f)(1), (2) (2010)[8].

The term "LJFL," or lower jaw-fork length, is "the straight-line measurement of a fish from the anterior tip of the lower jaw to the fork of the caudal fin. The measurement is not made along the curve of the body." 50 C.F.R. § 635.2. The term "CK," or cleithrum to caudal keel, means "the length of a fish measured along the body contour, i.e., a curved measurement, from the point on the cleithrum that provides the shortest possible measurement along the body contour to the anterior portion of the caudal keel. The cleithrum is the semicircular bony structure at the posterior edge of the gill opening." *Id.*

Standard of Proof

To prevail on its claim that Respondent violated the Act and the regulations, the Agency must prove facts constituting the violation by a preponderance of reliable, probative, credible, and substantial evidence. 5 U.S.C. § 556(d); *Cuong Vo*, 2001 NOAA LEXIS 11, at *17 (NOAA Aug. 17, 2001) (citing *Dep't of Labor v. Greenwich Colleries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100-03 (1981)); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). To satisfy this standard of proof, the Agency may rely upon either direct or circumstantial evidence. 2001 NOAA LEXIS 11, at *17 (citing *Reuben Paris, Jr.*, 4 O.R.W. 1058 (NOAA 1987)).

This standard of proof "requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" *Winship*, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (quoting F. James, Civil Procedure 250-51 (1965))); *see also Concrete Pipe and Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

"[A] preponderance of the evidence can be said to 'describe a state of proof that *persuades* the fact finders that the points in question are 'more probably so than not.'" *Ortiz v. Principi*, 274 F.3d 1361, 1365 (Fed. Cir. 2001), 2001 U.S. App. LEXIS 26687 (quoting Mueller & Kirkpatrick, Evidence § 3.3 (1995) (emphasis in original). "Evidence preponderates when it is more convincing to the trier of fact than the opposing evidence." *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1044-45 (Fed. Cir. 1992) (quoting McCormick on Evidence

[8] The Code of Federal Regulations in effect at the time of the alleged violation (February 28, 2011) was the 2010 edition. It is this edition that is used throughout this decision, unless otherwise specified.

§ 339 (2d ed. 1972) at 793). Thus, the Agency must demonstrate that the facts it seeks to establish are more likely than not to be true. *Fernandez*, 1999 NOAA LEXIS 9, at *8-9 (NOAA Aug. 23, 1999) (citing *Herman & MacClean v. Huddleston*, 459 U.S. 375, 390 (1983)).

Civil Penalty

Section 308(a) of the Act provides that "[a]ny person who is found by the Secretary . . . to have committed an act prohibited by section 307 [of the Act] shall be liable to the United States for a civil penalty." 16 U.S.C. § 1858(a); *see also* 50 C.F.R. § 600.735 (incorporating statutory civil and criminal penalty provisions, and civil forfeiture provisions). The amount of the civil penalty cannot exceed $140,000. 16 U.S.C. § 1858(a); *see* Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, 104 Stat. 890, amended by Debt Collection and Improvement Act of 1996, Pub. L. 104134, 110 Stat. 1321; 5 C.F.R. § 6.4(e)(14) (effective for violations that occurred between December 11, 2008, and December 6, 2012); 73 Fed. Reg. 75,321, 75,322 (Dec. 11, 2008); 77 Fed. Reg. 72,915, 72,917 (Dec. 7, 2012). No penalty assessment may be made unless the alleged violator is given notice and opportunity for a hearing conducted in accordance with Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554. 16 U.S.C. § 1858(a).

To determine the appropriate amount of the civil penalty, the Act identifies certain factors to consider.

> [T]he Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require. In assessing such penalty the Secretary may also consider any information provided by the violator relating to the ability of the violator to pay, Provided, That the information is served on the Secretary at least 30 days prior to an administrative hearing.

16 U.S.C. § 1858(a). Similarly, Agency regulations pertaining to Civil Procedures set forth at 15 C.F.R. Part 904 (the "Rules of Practice") provide, in pertinent part:

> Factors to be taken into account in assessing a civil penalty, depending upon the statute in question, may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior violations, and ability to pay; and such other matters as justice may require.

15 C.F.R. § 904.108(a).

V. ANALYSIS

Parties' Arguments Regarding Liability

The Agency's argument[9] as to Respondent's liability and circumstances of the violation is rather straightforward. It argues that the evidence and testimony established that, "on February 28, 2011, Respondent was a federally-permitted dealer operating in St. Augustine, Florida," and when Chesler and Fields inspected Respondent's facilities that day, they found an Atlantic swordfish that was missing its "bill, upper jaw and top of the head, forward of the eye sockets." Agency's Ini. Br. at 4–5 (citing AE 18, Tr. 62-3). The Agency argues that Respondent informed Chesler that it purchased the fish on February 11, 2011, from the fishing vessel Yellowfin. *Id.* at 5 (citing Tr. 68; AE 2 at 5). This information was corroborated by dealer reports received from Respondent, a fishing log and landing report received from the owner of the Yellowfin, and Trew's observer logs, which indicated that "the vessel was fishing in the Florida East Coast and South Atlantic Bight areas of the Atlantic Ocean during the trip," thus establishing that this fish was taken from its management unit. *Id.* (citing AE 13 at 3–4, AE 16 at 1).

The Special Agents took two measurements of the swordfish, which were recorded as measuring "27" CK and 46" LFJL." *Id.* (citing AE 1 at 5–6, AE 2 at 5, AE 18; Tr. 62, 64, 106, 108). The Agency asserts, however, that "only the CK measurement was valid and that under 50 C.F.R. § 635.20(f)(2), the fish was undersized" by two inches *Id.* at 5–6. According to the Agency, the CK measurement is the only applicable measurement because the head of the fish was not "naturally attached." *Id.* at 6–7. The Agency acknowledges that the regulations in effect in 2011 did not define the term "naturally attached," but it asserts that Agency guidance provided that "if any portion of the head had been modified, the CK measurement applied," and in this case, "a fish which has had its bill, upper jaw and skull forward of the eye sockets all removed could [not] be thought of as having its head 'naturally attached.'" *Id.* at 6–7 (citing Tr. 42, 43, 44). The Agency claims that the reason the LJFL measurement can only be used when the head of the fish is intact is because when the head is removed, there is the potential for the measurement to be inaccurate and potentially longer due to the alteration of the musculature and connective tissue and manipulation of the lower jaw. *Id.* at 7 (citing Tr. 36, 37, 38).

The Agency argues in the alternative that "[e]ven if the LJFL measurement were applicable to the Atlantic swordfish at issue in this case, the fish was still undersized" since it measured only "46" LJFL" when measured by Chesler and Fields. *Id.* at 8-9. The Agency also notes that, with regard to the purported LJFL measurements taken by Respondent and Trew, "both took curved measurements, meaning that they measured the fish with the tape measure along the contour of the fish's body," not using a "straight-line LJFL measurement" as set out in the applicable regulations and as used by Chesler and Fields. *Id.* at 8.

Finally, regarding the new lower CK minimum size requirement (25 inches) that took effect on August 30, 2012, the Agency asserts that "this subsequent change in the law had no retroactive effect and consequently has no bearing on Respondent's liability for violating regulations that were in effect on February 28, 2011." *Id.* (citing *United States v. McNab*, 324 F.3d 1266; 2003 U.S. App. LEXIS 5561, 30 (11th Cir. 2003); *United States v. Uni Oil Inc.*, 710

[9] The Agency cites to several exhibits that were not admitted into evidence and, therefore, were not considered in this decision. As previously identified, only Agency Exhibits 1, 2, 5 through 7, 11 through 13, 16, and 18, were admitted into evidence. Tr. 219.

F.2d 1078, 1084, n.4 (5th Cir. 1983)). Further, the Agency asserts that "[t]he change was made to allow the United States to harvest more of its ICCAT-established quota, given [that] the then-current status of the stock" had been fully rebuilt. *Id.* at 9 (citing Tr. 46-7).

In its brief,[10] Respondent does not dispute that he is a "person" as defined in the Act or that the Atlantic swordfish in question was taken from the applicable management unit. The crux of Respondent's argument is its disagreement with the Agency that the CK measurement is the only applicable measurement for the swordfish in question, since, according to Respondent, "the head of fish #362 was naturally attached." Resp. Br. at 9. In support of this assertion, Respondent recognizes that "[i]n 2010, Part 635 of the Atlantic Highly Migratory Species Act did not define 'naturally attached' as to the head of a swordfish," but it asserts that "[u]nder standard legislative interpretation, courts are to first turn to clear legislative intent . . . in determining a specific term," and in the absence of any clear intent "they will next seek the common sense meaning of a term while utilizing any other part of a statute in order to glean some measure of legislative intent." *Id.* at 8. Recognizing that this case does not involve shark fins, Respondent nevertheless points to the definition of "naturally attached" as it relates to shark fins[11] to argue that it provides "insight as to what the legislature was contemplating when Part 635 was developed" and that the legislature "recognized that not everything can be perfectly done, and so long as the intent is met . . . they were willing to accept some measure of deviation." *Id.* Respondent contends that "the Agency has attempted to define naturally attached via 'Agency Guidelines' . . . as any portion of the head being removed, however they fail to show that any person (to include the Respondent or Captain Davis) was actually informed of this" in that this interpretation was not found either in the statute or in the "HMS Dealer Guidelines" and was not communicated verbally to either individual. *Id.*

Respondent argues that "[u]ltimately, while the CK measurement was utilized, it is the Respondent's position that because the head of fish #362 was naturally attached under 2010 law the LJFL measurement should have been used." *Id.* at 9. Thus, Respondent cites much of the testimony regarding how the LJFL measurement was performed and makes arguments related to that form of measurement.[12] *See* Resp. Br. *passim*. Lastly, Respondent acknowledges that "[u]ltimately, the statute is silent upon retroactivity," but argues that under the 2012 regulations the fish would be legal using the CK measurement standard of 25 inches and that the "Agency has failed to proof by a preponderance of the evidence that the Respondent possessed an undersized swordfish under 2012 law." Resp. Br. at 10.

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[10] I note that the pages of Respondent's Initial Post-Hearing Brief are not numbered. In my references to Respondent's brief, I have cited to the physical page numbers of the brief.

[11] Respondent cites to the definition as follows: "Naturally attached refers to shark fins that remain attached to the shark carcass via at least some portion of uncut skin." Resp. Br. at 8 (citing 50 C.F.R. § 635.2 (2010)).

[12] As discussed below, since I find such arguments immaterial to the issues I must resolve in this case and the law in effect at the time of the violation, I have not repeated Respondent's arguments on this point in further detail in this decision.

The Agency, in its Reply Brief, makes the point that Respondent's insistence on looking to the definition of "naturally attached" as it pertains to shark fins for guidance in what the term means for swordfish is misplaced, because

> a plain language reading of 50 C.F.R. § 635.20 (f)(1)(2010), which uses the terms "naturally attached" and "whole (head on)" interchangeably, does not support an interpretation under which, as in the instant case, a fish which has had its bill, upper jaw and skull forward of the eye sockets all removed could be thought of as having its head "naturally attached."

Agency's Rep. Br. at 3. The Agency also notes that the evidence upon which Respondent relies to rebut the Agency fails in that "measurements taken by Mr. Trew and the Respondent [were taken] from the tip of the lower jaw to the fork of the caudal fin *along the curve of the fish's body*." *Id.* at 4 (emphasis in original) (citing RE 8 and Tr. 53, 54, 121, 211). Yet, the "LJFL is defined as 'the straight-line measurement of a fish from the tip of the lower jaw to the fork of the caudal fin. *The measurement is not made along the curve of the body*.'" *Id.* at 5 (emphasis in original) (citing 50 C.F.R. § 635.2 (2010)). In its reply, the Agency renews many of its earlier arguments, which I need not repeat here.

Discussion of Liability

The undisputed evidence in the record establishes that Seafood Shoppe is a "person" as defined in the Act and that the swordfish in question was taken from the Agency's management unit. AE 13 at 3–4, AE 16 at 1, AE 18. In dispute is whether the swordfish Respondent took no longer had its head naturally attached and was less than 29 inches in length from cleithrum to caudal keel.

With regard to the meaning of "naturally attached" and the manner in which such meaning was communicated to the regulated community, I acknowledge, as Respondent pointed out, the troubling nature of the Agency's reliance on its "guidance" as the method of communication since, according to Blankinship, this "guidance" was not published to the public through, for example, a rule-making process, but "was communicated . . . in answer to questions that came in about it when we received phone calls" or "in discussion with our highly migratory species advisory panel, which is representation from different portions of the fishery and other members like academia." Tr. 43-44. This is not typically the form of guidance relied upon in support of a regulatory enforcement. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that courts may look to guidance materials as a source of "experience and informed judgment" that nonetheless are not binding on courts); *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (holding that guidance materials are not binding precedential rules, but are merely public proclamations of intended actions). Notably, the "guidance" upon which the Agency has relied does not appear to have been disseminated in a manner consistent with a "public proclamation" of the Agency's position. Rather, it appears that information was communicated randomly through informal telephone conversations initiated by members of the public. Nevertheless, such "guidance" is not determinative of what naturally attached means in the context of the size regulations pertaining to Atlantic swordfish since the plain meaning of the regulations in effect at the time of the violation is clear.

As previously explained, Agency regulations provide, in pertinent part, that

> For a swordfish that has its head naturally attached, the [lower jaw-fork length] LJFL is the sole criterion for determining the size of a swordfish. No person shall take, retain, possess, or land a whole (head on) North or South Atlantic swordfish taken from its management unit that is not equal to or greater than 47 inches (119 cm) LJFL.

50 C.F.R. § 635.20(f)(1). I find the Agency's point — that the terms "naturally attached" and "whole (head on)" have been used interchangeably in this section of the regulations — persuasive and find Respondent's allegations of vagueness in the regulatory language unconvincing. The second sentence of this provision makes clear that the object of the prohibited conduct is a "whole (head on) North or South Atlantic swordfish" and that such a fish must be equal to or greater than 47 inches LJFL to be taken, retained, possessed, or landed. This regulatory provision plainly expresses the intent that the fish possess its whole head for it to be considered "naturally attached" and that, under such circumstances, the LJFL measurement is the "sole criterion for determining the size." As an aside, it is worth noting that the common use definition of "naturally" is "used to describe something that happens or exists by itself without being controlled or changed by someone." Merriam-Webster, http://www.merriam-webster.com/dictionary/naturally. The common use definition of "natural" is "existing in nature and not made or caused by people." Merriam-Webster, http://www.merriam-webster.com/dictionary/natural.

It is undisputed that the swordfish at issue in this case had all but the lower jaw of its head removed by the butcher aboard the Yellowfin. Specifically, the upper portion of the head was removed, from the eyeball cavity up to and including the bill of the swordfish, while the lower jaw of the fish remained. Tr. 170–71, 176–78, AE 12, RE 8. Thus, the swordfish was not "whole (head on)," thereby making the use of a LJFL measurement improper under the applicable regulations.[13] As an additional note, turning to the common use definitions of "natural" and "naturally," the uncontroverted evidence shows that, following the human intervention of the butcher of removing portions of the swordfish head, the head of the swordfish was no longer in a "natural" or "naturally" attached state.

Respondent has urged that I consider the definition of "naturally attached" as it related to shark fins as a means of determining the intended definition of "naturally attached" as it related to swordfish. I disagree that such a need exists since, as stated, I do not find the language of the applicable regulatory provisions vague. Nevertheless, my consideration of the definition as regards to shark fins does not yield support for Respondent's position. The 2010 definition of "naturally attached" relied upon by Respondent — namely, that "[n]aturally attached refers to

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[13] I note that Respondent's allegation that the swordfish was not undersized using the LJFL measurement was based upon an improper LJFL measurement taken by Respondent. Specifically, Respondent's independent measurement of the swordfish, following the inspection by law enforcement, was made by improperly taking a curved, rather than a straight-line, measurement of the fish. *See* Tr. 159, 201, 206, 211; R8.

shark fins that remain attached to the shark carcass via at least some portion of uncut skin," — by its own terms illustrates that the shark's fin remains attached to the shark carcass by "at least some portion of uncut skin." In the instant case, the portion of the swordfish head that was cut out was entirely removed from the fish carcass and discarded and did not remain attached by "at least some portion of uncut skin." Respondent does not attempt to reconcile such differences.

I also considered Respondent's assertion that the manner in which the swordfish at issue was cut — namely, removing portions of the head "from the eyeballs forward" as well as removal of the bill — was a butchering method that was allegedly approved by NMFS, according to the testimony of Davis. Resp. Br. at 5, Tr. 170-71. Specifically, Davis testified as follows: "And at the time I believe I—I don't remember who I talked to, but I did talk to National Marine Fisheries and it was accepted at the time. But I don't know who I talked to. And that was the best way that I was told to do it." Tr. 171. However, when confronted with the fact that, of the hundreds of pounds of swordfish caught during this trip, only two swordfish were cut in this manner, Davis acknowledged that the two swordfish cut in this manner had not met the minimum size limits using the CK measurement but he alleged that the fish were of legal size limits using the LJFL measurement. Tr. 177-78. Given the lack of specificity and detail, and the limited recollection of this testimony, I have afforded it little, if any, weight.

Based on my review of the credible evidence presented in this case, I conclude that the CK measurement — applicable when the head of a swordfish has been removed prior to or at the time of landing — was the appropriate and sole criterion for determining the size of the swordfish in question. Consequently, the arguments presented relating to use of the LJFL measurement are deemed irrelevant and not further addressed in this decision.

Having determined that the CK measurement was the sole criterion for determining the size of the swordfish at issue in this case, I now turn to the evidence presented concerning the actual measurement taken of this swordfish. The evidence in the record establishes that the only proper CK measurement of the swordfish was performed by Chesler, who testified credibly as to how he performed the measurement:

> Q[uestion] And how did you go about measuring the fish?
>
> A[nswer] Since the top portion of the head was removed, we took the CK or cleithrum to caudal keel measurement. We used a tape measure, laid it on the bony portion of the cleithrum, ran the tape measure to the anterior portion of the caudal keel, which is like a small finlet that extends horizontally from the body of the fish. So as the swordfish is swimming, it would extend out horizontally, not vertically, if that's clear.
>
> So we ran the tape measure from the cleithrum, which is that hard bony portion. It was covered by the gill plate, but we were able to manipulate the gill plate, place the tape measure on that hard bony part, and run it to the anterior or the forward portion of the caudal keel. And that measurement at that time was I believe 26 inches.
>
> Q[uestion] Did you –

A[nswer] I'm sorry. 27 inches, I believe.

Q[uestion] Did you document these measurements in any way?

A[nswer] Yes. I documented using a catch measurement form.

Tr. 63. Chesler's testimony was corroborated by his contemporaneous record of the measurement on a NOAA Measurement Form (AE 5); the notes of the violation in his Boarding/Inspection Report (AE 2 at 5) and Enforcement Action Report (AE 6); and the summary in his Offense Investigation Report (AE 1). The photographs taken at the time of the measurement show that it was a curved-line measurement from the cleithrum to the caudal keel along the body of the fish as described in the regulations. AE 12; 50 C.F.R. § 635.2. Respondent's contention that it is difficult to confirm Chesler's measurements because some of the photographs were dark is unpersuasive when his contemporaneous recording of the measurements reveal the true size of the fish and the clear photographs show that the measurement was taken accurately. Furthermore, Respondent agreed to the CK measurement of 27 inches when he signed the NOAA Measurement Form (AE 5) and did not dispute the accuracy of the measurement during the evidentiary hearing (Tr. 14, 198-99). Additionally, as previously stated, Davis acknowledged on cross examination during the hearing that the fish in question was cut in the manner found by the Special Agents because it was undersized using the CK measurement. Tr. 177–78.

In light of the foregoing analysis and upon consideration of all the credible and material evidence in the record, I conclude that the Agency has proven a violation of the Act and the applicable regulations by a preponderance of the evidence.

I considered Respondent's arguments concerning retroactive application of the change in law in 2012 that affected the size limitations set forth in 50 C.F.R. § 635.20(f)(2). Specifically, on August 30, 2012, nearly 18 months after the violation at issue in this case, new size limit regulations became effective that resulted in a reduction of the minimum size limits using the CK measurement from 29 inches to 25 inches. 50 C.F.R. § 635.20(f)(2) (2012). Respondent has argued that, under the 2012 law, the swordfish at issue would be of legal size. Respondent concedes that "[u]ltimately, the statute is silent upon retroactivity." Resp. Br. at 10. Nevertheless, Respondent urges that I afford it the benefit of the reduced minimum size regulations from 2012, even though such regulations were not in effect at the time of the violation on February 28, 2011, because the Agency did not file the NOVA prior to the regulatory change and "any risk or error in waiting should thus be applied to the Agency." Resp. Br. at 10.

I am not persuaded by Respondent's arguments. Respondent has not supported its arguments and theory with citation to any legal authority, and I have not independently found such support. Rather, noting "apparent tension" between two earlier holdings of the U.S. Supreme Court concerning retroactivity (in *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974) and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)), the Court reaffirmed "the generally accepted axiom that '[r]etroactivity is not favored in the law. . . . [C]ongressional en-

actments and administrative rules will not be construed to have retroactive effect unless their language requires this result.'" *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990) (citing *Georgetown Univ. Hosp.*, 488 U.S. at 208). The Court reasoned that it need not "reconcile the two lines of precedent represented by *Bradley, supra*, and *Georgetown, supra*, because under either view, where the congressional intent is clear, it governs." *Id.* (citing *Bradley*, 416 U.S. at 716-17 and *Georgetown Univ. Hosp.*, 488 U.S. at 208). It is undisputed that the statute and regulations at issue in this case are silent as to retroactivity. Accordingly, I agree with the Agency that the regulations applicable in this case are those that were in effect at the time of the violation. Lastly, I note that, contrary to Respondent's suggestion, the timing of the issuance of the charging document, or NOVA, does not influence the law that was in effect at the time of the violation and that is to be applied when determining liability.

Parties' Arguments Regarding the Civil Penalty

Regarding the penalty, the Agency argues that its proposed penalty is appropriate based upon the statutory factors: "the nature, circumstances,[14] extent and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require."[15] Agency's Ini. Br. at 10–11 (citing 16 U.S.C. § 1858(a)).

The Agency asserts that "Respondent's reckless disregard for the law highlights the need to assess a penalty that will encourage future compliance." *Id.* at 11. Regarding the nature of the violation, the Agency argues that the United States has "international obligations as a member of the International Commission for the Conservation of Atlantic Tunas (ICCAT)," which is "responsible for the conservation and management of . . . swordfish." *Id.* (citing Tr. 16, 17; 77 Fed. Reg. 25,669 (May 1, 2012); 77 Fed. Reg. 45,273 (July 31, 2012)). Further, the Agency asserts, one of the swordfish conservation and management measures (minimum size) serves to protect "juvenile swordfish in order to allow a good portion of them to reach maturity and reproduce. Even a difference of an inch or two matters because it keeps that many more fish in the population that may be able to reproduce." *Id.* (citing Tr. 17, 18, 46).

The Agency argues that its proposed penalty reflects the insignificant extent of the violation involving only a single fish. *Id.* However insignificant the extent of the violation may be, the Agency asserts that the gravity of the violation is such that "compliance with the regulations is critical if swordfish are to recover from their overfished status," due to the "number of participants in the Atlantic swordfish fishery" and "the aggregate impact of all similar violations." *Id.* at 12 (citing Tr. 45, 46). Moreover, the Agency asserts that "[i]n 1999,

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[14] The Agency's argument regarding the circumstances of the violation is set forth in its argument as to Respondent's liability.

[15] Although the Agency also refers to its proposed penalty as being consistent with NOAA's penalty policy, I note that the Agency's penalty policy was neither introduced as an exhibit in the evidentiary hearing nor the subject of a request that I take official notice of the policy pursuant to 15 C.F.R. § 904.204(l). Accordingly, my decision regarding the imposition of a civil penalty has been limited to the statutory factors as set out in 16 U.S.C. § 1858 (a) and as essentially reiterated in the Rules of Practice.

Atlantic swordfish were overfished but the stock has been rebuilt through the implementation of management measures, based on scientific advice, including minimum size requirements." *Id.* (citing Tr. 45, 46).

Regarding Respondent's culpability, prior offenses and other matters as justice may require, the Agency points out that of all the catch landed by the Yellowfin on February 25, 2011, only two, including the swordfish at issue, were dressed in the same manner, specifically "because they were short using the CK measurement," which reveals that Respondent at least knew that the swordfish at issue "was awfully close" to being undersized. *Id.* (citing Tr. 177, 178, 191, 192, 199; AE 13 at 3). This, the Agency argues, suggests that Respondent was negligent. The Agency did not reduce the proposed penalty for Respondent's acceptance of responsibility because Respondent has not done so. *Id.* at 12–13. The Agency has also not proposed an increase of the penalty for relevant prior offenses because Respondent has none. *Id.* at 13.

Respondent asserts that "[t]his has never been a case about money, but principle," and that it is able to pay a fine. Resp. Br. at 11. Respondent further argues that the "circumstances of the violation are extremely favorable to [it]" because "[i]f the allegations are true, then [Respondent] is the victim of trusting the Captain and NOAA observer, not the mastermind of intentional manipulation." *Id.* Respondent asserts that the extent and gravity of the violation is "minimal to none," as indicated in its argument as to liability. Respondent argues that "the fish is legal" under the 2012 regulations. *Id.* at 10. Respondent points out that the "Agency's expert established [that] 1) [] the fish stock is 'fully rebuilt[,]' 2) [] the United States is under harvesting their quota[,] and 3) [] the new measurement is more accurate to ICCAT's measurements." *Id.* Respondent claims that its culpability for the violation is "minimal to none" because "he has done nothing wrong but be inadequately advised by other people, to specifically include the Agency who failed to establish or at least communicate proper guidelines for the Respondent to follow." *Id.* at 11. Respondent claims an "exceedingly favorable" and 20-year long history of operating his shop with no violations. *Id.*

Discussion of Civil Penalty Assessment

Having determined that Respondent is liable for the charged violation, I must next determine the appropriate civil penalty for the violative behavior. There is no presumption in favor of the penalty proposed by the Agency, and as the Administrative Law Judge presiding in this matter, I am not "required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document." *Nguyen*, 2012 NOAA LEXIS 2, at *21 (NOAA Jan. 18, 2012); *see* 15 C.F.R. § 904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631 (June 23, 2010). Rather, I must independently determine an appropriate penalty, "taking into account all of the factors required by applicable law." 16 U.S.C. § 1858(a); *see* 15 C.F.R. § 904.204(m), 15 C.F.R. § 904.108 (enumerating factors that may be considered in assessing a penalty depending on the applicable statute). Thus, in assessing the below penalty, I have considered the factors set forth in the Act and the Agency regulations. These factors include the nature, circumstances, extent, and gravity of the violation; the respondent's degree of culpability and history of prior violations; and such other matters as justice may require. Although the Act allows for consideration of the ability to pay the penalty,

Respondent has not alleged an inability to pay the penalty (in fact, Respondent concedes the ability to pay a fine); therefore, this factor will not be considered. *See* 16 U.S.C. § 1858(a); *see also* 15 C.F.R. § 904.108; Resp. Br. at 11.

i. Nature, Circumstances, Extent, and Gravity of the Alleged Violation

The evidence in the record pertaining to the circumstances and extent of the violation is that it was not particularly difficult to detect because it involved an apparently routine inspection of a federally permitted dealer. Tr. 59–75. Chesler deemed the value of the fish unworthy of seizing to sell because "it wasn't worth the time and effort to do that," Tr. 77,given that Respondent only possessed one undersized swordfish, Tr. 77–78; AE 1, 2, 5, 6, 7, 12, 16, 18; RE 8. In fact, Chesler could not recall if he gave Respondent instructions to destroy or at least refrain from selling the fish. Tr. 78. There appears to be no disagreement between the parties as to the minimal circumstances and extent of the violation in this case.

As to the nature and gravity of the violation, the Agency offered evidence through the testimony of Blankinship that the conservation and management of Atlantic swordfish involves the coordinated efforts and agreement between the United States and foreign nations as members of the International Commission for the Conservation of Atlantic Tunas. Tr. 16–17. The conservation and management measures recommended issued by ICCAT are binding upon the member nations. Tr. 17. Conservation and management measures related to the harvest of swordfish, such as minimum size requirements, "protect juvenile swordfish and allow them to grow to a larger size so a good portion of them reach maturity and can reproduce and contribute to the stock." Tr. 17–18. Respondent argues that these factors also weigh in its favor because Blankinship testified that the Atlantic swordfish had fully recovered and that the United States was under harvesting its quota of Atlantic swordfish as a result of the minimum size requirements in effect at the time of the violation. Thus, Respondent's position is that it should get the benefit of the 2012 size requirements. On the other hand, the Agency's position is that even though the extent of the violation is minimal due to the fact that there was only one fish involved in this case, there are many participants in the Atlantic swordfish fishery, and violations such as these, in the aggregate, impair the regulatory scheme if strict compliance is not demanded of the participants to the fishery.

I am persuaded by the Agency's arguments and disagree that the gravity of the violation weighs in Respondent's favor. The United States has a responsibility to ensure the conservation and management of this important fishery. The fishery has been able to recover because of the regulations implementing the conservation and management measures recommended by ICCAT. Respondent's unsupported arguments that the 2012 regulations should apply because the Agency filed the NOVA after the effective date of the new regulations or because the fish would now be legal are rejected and are also undermined by the fact that Respondent was given the opportunity to accept responsibility early when it was issued a citation by Chesler on the day of the inspection. AE 6. Based on the totality of the evidence presented, I conclude the gravity of the violation to be serious and detrimental to the regulatory scheme, which warrants a penalty that will ensure future compliance.

ii. Respondent's culpability and history of violations, and other matters as justice may require

The Agency argues that Respondent was negligent because Respondent failed to ensure that the swordfish at issue met the minimum size requirements even though there were indications that the swordfish was too small, including that it was one of two swordfish out of many that were dressed in the manner that only part of its head was removed. On the other hand, Respondent asserts it was a victim because Mr. Weeks trusted Trew's measurement of the fish. The evidence in the record is that, on February 25, 2011, of all of the fish delivered to Respondent from the fishing vessel Yellowfin, two were set aside because they were dressed differently than the others and they were notably smaller than the other larger swordfish. Tr. 191. Mr. Weeks's practice was to weigh the bigger fish before moving on to measure the smaller fish. *See* Tr. 191–92, 215–16. As Mr. Weeks was prepared to retrieve his tape measure to measure the smaller fish, Trew stated that "those fish are fine." Tr. 192, 209. Although Respondent claims he was a victim for trusting Trew and his statement, the fact remains that Mr. Weeks had never met Trew prior to this occasion and "thought [he] worked for NOAA." Tr. 189, 209. In fact, this was his first encounter with the Observer Program and with a NOAA observer. Tr. 209. Further, Respondent was unaware of the method of measurement Trew utilized to support the claim that the size of the fish were "fine." Tr. 216. Given such circumstances, I find Mr. Weeks' reliance on the non-specific statement that the fish were "fine" to be unreasonable and his actions, at minimum, negligent for failing to ensure that all of the Atlantic swordfish in his possession were in compliance with the applicable regulations. Accordingly, Respondent's level of culpability has been factored into my assessment of an appropriate penalty.

I also considered the undisputed fact that Respondent has no relevant history of violations, amid a "20 year[] history of operating his shop." Resp. Br. at 11, Agency's Ini. Br. at 13. While a history of non-compliance may serve as a basis to increase a penalty, a number of administrative tribunals have found, conversely, that the absence of prior offenses may support the assessment of a lower penalty. *See, e.g.*, *Frenier*, 2012 NOAA LEXIS 11, at *39-40 (NOAA Sept. 27, 2012) ("[T]he absence of any prior or subsequent offenses can serve as a mitigating factor and support the assessment of a lower civil penalty under certain circumstances."); *Straub*, 2012 NOAA LEXIS 1, at *24 (NOAA Feb. 1, 2012) ("The absence of prior offenses . . . tends to favor a low civil monetary penalty."); *The Fishing Co. of Alaska*, 1996 NOAA LEXIS 11, at *43-44 (NOAA Apr. 17, 1996) ("In an industry that is so heavily regulated, this absence of prior violations by any of the Respondents has been taken into consideration as a mitigating factor in the penalty assessment."). The fact that Respondent has no history of prior violations amidst a lengthy career in the industry weighs in its favor with regard to penalty mitigation.

Upon consideration of all the foregoing and the penalty factors listed in the Act at 16 U.S.C. § 1858(a), it is hereby determined that for the single count violation of the Act, a civil penalty in the amount of $1,800 is appropriate.

VI. DECISION AND ORDER

Respondent is liable for the charged violation in this case. A civil monetary penalty of $1,800 is imposed for the charged violation. Once this Initial Decision becomes final under the provisions of 15 CFR § 904.271(d), Respondent will be contacted by NOAA with instructions as to how to pay the civil penalty imposed herein.

PLEASE TAKE NOTICE, that any petition for reconsideration of this Initial Decision must be filed with the undersigned within 20 days after the Initial Decision is served. 15 C.F.R. § 904.272. Such petition must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. *Id.* Within 15 days after a petition for reconsideration is filed, any other party to this proceeding may file an answer in support or in opposition. The undersigned will rule on any petition for reconsideration.

PLEASE TAKE FURTHER NOTICE, that any petition to have this Initial Decision reviewed by the NOAA Administrator must be filed with the Administrator within 30 days after the date this Initial Decision is served and in accordance with the requirements set forth at 15 C.F.R. § 904.273. A copy of 15 C.F.R. §§ 904.271-273 is attached.

PLEASE TAKE FURTHER NOTICE, that this Initial Decision becomes effective as the final Agency action 60 days after service, unless the undersigned grants a petition for reconsideration or the Administrator reviews the Initial Decision. 15 C.F.R. § 904.271(d).

PLEASE TAKE FURTHER NOTICE, that upon failure to pay the civil penalty to the Agency within 30 days from the date on which this decision becomes final Agency action, the Agency may request the U.S. Department of Justice to recover the amount assessed, plus interest and costs, in any appropriate district court of the United States or may commence any other lawful action. 15 C.F.R. § 904.105(b).

SO ORDERED.

Christine Donelian Coughlin

Christine Donelian Coughlin
Administrative Law Judge
U.S. Environmental Protection Agency

Dated: September 16, 2015
Washington, DC

TITLE 15 -- COMMERCE AND FOREIGN TRADE
SUBTITLE B -- REGULATIONS RELATING TO COMMERCE AND FOREIGN TRADE
CHAPTER IX -- NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE
SUBCHAPTER A -- GENERAL REGULATIONS
PART 904 -- CIVIL PROCEDURES
SUBPART C -- HEARING AND APPEAL PROCEDURES
DECISION

15 CFR 904.271-273

§ 904.271 Initial decision.

(a) After expiration of the period provided in § 904.261 for the filing of reply briefs (unless the parties have waived briefs or presented proposed findings orally at the hearing), the Judge will render a written decision upon the record in the case, setting forth:

(1) Findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law, or discretion presented on the record;

(2) An order as to the final disposition of the case, including any appropriate ruling, order, sanction, relief, or denial thereof;

(3) The date upon which the decision will become effective; and

(4) A statement of further right to appeal.

(b) If the parties have presented oral proposed findings at the hearing or have waived presentation of proposed findings, the Judge may at the termination of the hearing announce the decision, subject to later issuance of a written decision under paragraph (a) of this section. In such cases, the Judge may direct the prevailing party to prepare proposed findings, conclusions, and an order.

(c) The Judge will serve the written decision on each of the parties, the Assistant General Counsel for Enforcement and Litigation, and the Administrator by certified mail (return receipt requested), facsimile, electronic transmission or third party commercial carrier to an addressee's last known address or by personal delivery and upon request will promptly certify to the

Administrator the record, including the original copy of the decision, as complete and accurate.

(d) An initial decision becomes effective as the final administrative decision of NOAA 60 days after service, unless:

(1) Otherwise provided by statute or regulations;

(2) The Judge grants a petition for reconsideration under § 904.272; or

(3) A petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative under § 904.273.

§ 904.272 Petition for reconsideration.

Unless an order or initial decision of the Judge specifically provides otherwise, any party may file a petition for reconsideration of an order or initial decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. Petitions must be filed within 20 days after the service of such order or initial decision. The filing of a petition for reconsideration shall operate as a stay of an order or initial decision or its effectiveness date unless specifically so ordered by the Judge. Within 15 days after the petition is filed, any party to the administrative proceeding may file an answer in support or in opposition.

§ 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision within 30 days after the date the decision is served. The petition must be served on the Administrator by registered or certified mail, return receipt requested at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Copies of the petition for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel for Enforcement and Litigation at the following address: Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse, modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

(c) Review by the Administrator of an initial decision is discretionary and is not a matter of right. If a party files a timely petition for discretionary review, or review is timely undertaken on the Administrator's own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator or until the initial decision becomes final pursuant to paragraph (h) of this section.

(d) A petition for review must comply with the following requirements regarding format and content:

(1) The petition must include a concise statement of the case, which must contain a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the petition;

(2) The petition must set forth, in detail, specific objections to the initial decision, the bases for review, and the relief requested;

(3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statutes, regulations, and principal authorities. Petitions may not refer to or incorporate by reference entire documents or transcripts;

(4) A copy of the Judge's initial decision must be attached to the petition;

(5) Copies of all cited portions of the record must be attached to the petition;

(6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and

(7) Issues of fact or law not argued before the Judge may not be raised in the petition unless such issues were raised for the first time in the Judge's initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content requirements in paragraph (d) of this section without further review.

(f) No oral argument on petitions for discretionary review will be allowed.

(g) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. An answer must comport with the format and content requirements in paragraphs (d)(5) through (d)(7) of this section and set forth detailed responses to the specific objections, bases for review and relief requested in the petition. No further replies are allowed, unless requested by the Administrator.

(h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective date 150 days after the petition is served.

(i) If the Administrator issues an order denying discretionary review, the order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final agency decision. The Administrator need not give reasons for denying review.

(j) If the Administrator grants discretionary review or elects to review the initial decision without petition, the Administrator will issue an order to that effect. Such order may identify issues to be briefed and a briefing schedule. Such issues may include one or more of the issues raised in the petition for review and any other matters the Administrator wishes to review. Only those issues identified in the order may be argued in any briefs permitted under the order. The Administrator may choose to not order any additional briefing, and may instead make a final determination based on any petitions for review, any responses and the existing record.

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

(l) An initial decision shall not be subject to judicial review unless:

(1) The party seeking judicial review has exhausted its opportunity for administrative review by filing a petition for review with the Administrator in compliance with this section, and

(2) The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the Judge's initial decision has become the final agency decision under paragraph (h) of this section.

(m) For purposes of any subsequent judicial review of the agency decision, any issues that are not identified in any petition for review, in any answer in support or opposition, by the Administrator, or in any modifications to the initial decision are waived.

(n) If an action is filed for judicial review of a final agency decision, and the decision is vacated or remanded by a court, the Administrator shall issue an order addressing further administrative proceedings in the matter. Such order may include a remand to the Chief Administrative Law Judge for further proceedings consistent with the judicial decision, or further briefing before the Administrator on any issues the Administrator deems appropriate.